

FILED

30836-7-III

OCT 30 2012

COURT OF APPEALS

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DIVISION III
STATE OF WASHINGTON
By _____

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OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, APPELLANT

v.

TOMMY J. VILLANUEVA, RESPONDENT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

HONORABLE

BRIEF OF APPELLANT

STEVEN J. TUCKER
Prosecuting Attorney

Deric Martin, WSBA No. 28279
Deputy Prosecuting Attorney
Attorneys for Appellant

Spokane County Prosecutor's Office
1100 West Mallon
Spokane, Washington 99260
(509) 477-2850

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I.

ASSIGNMENTS OF ERROR

1. The trial court erred when it awarded, as a cost of defense, wage loss the defendant suffered as a consequence of pre-charging arrest.

II.

ISSUES PRESENTED

1. RCW 9A.16.110 requires the State to reimburse the “costs of defense” incurred by a defendant who is found not guilty by reason of self-defense. Prior to being charged in this case, Mr. Villanueva lost his job when he missed work as a result of his custodial arrest. Did the Superior Court err when it awarded Mr. Villanueva 15 months worth of diminished wages when his loss was not a result of being charged with or defending himself against a crime?

III.

STATEMENT OF THE CASE

On June 20, 2010, the Respondent, Tommy Villanueva stabbed both Robert Amicarella and Conal Blanchard in the neck with a knife. He was arrested immediately afterward and booked into jail. CP 67-68. At his first appearance on June 21, 2010, the superior court judge set bond at \$10,000. CP 69-70. Mr. Villanueva posted bond that same day and was released. CP 71-72.

On June 25, 2010, the Spokane County Prosecutor's Office charged Mr. Villanueva with two counts of Assault in the First Degree. CP 73-74. Each count included a deadly weapon enhancement. *Id.* Mr. Villanueva was arraigned on July 6, 2010, and remained out of custody until his trial. CP 75.

Judge Linda K. Tompkins presided over the jury trial, which began on January 18, 2012. In his testimony, Mr. Villanueva admitted committing the assaults and using the knife, but argued that he acted in self-defense and should be acquitted. On January 26, 2012, the jury found him not guilty of the charges and, in a special verdict, affirmatively found that he acted in self-defense as to each count. CP 1-6.

Following the jury's verdict, the defense moved for an award of costs and fees under RCW 9A.16.110. CP 8-55. Among the items sought by the defense was \$10,020 in lost wages. *Id.* Mr. Villanueva argued that his employer terminated him because he missed a scheduled shift during the single day he spent in custody. *Id.*; RP 4-7. He was unemployed from approximately June 21, 2010 to September 2011, when he enrolled as a student in a job-training program. CP 10.

The defense presented documentation with its motion showing that Mr. Villanueva had missed work prior to his arrest, and that his employer had warned him that any future absences--regardless of the basis--would result in his termination. CP 26-33. At the hearing, Mr. Villanueva claimed he would not have been fired from his job but for his pre-charging arrest. RP 10. He argued that he

was therefore entitled to the difference between what he would have made in his former position and what he was actually paid in unemployment compensation. For the single night he spent in jail, Mr. Villanueva sought 15 months in diminished wages. CP 22-25.

Judge Tompkins heard argument on the issue on April 18, 2012. While she agreed that Mr. Villanueva was entitled to be remunerated for his legal and traveling costs, she seemed to express skepticism about his claim for lost wages:

The defense portion, however, was not necessary until charges were filed. I recognize that the arrest circumstances were definitely a catalyst in the ultimate determination of his termination, but until such time as he began proceeding with a defense, I am not satisfied that the statute and its standard of proof of preponderance of the evidence has been satisfied. So we will have to move the meter forward to the date of filing the Information and, Counsel, do you have off [sic] the top of your head?

RP 12-13.

Despite her reservations, however, Judge Tompkins ultimately found that the loss of Mr. Villanueva's job was a consequence of defending himself against the assault charges.

It does appear just [sic] the fact of absence from the employment was, in fact, the event that caused the termination but for the arrest [sic]. Counsel, I am sorry. I am struggling with that from a public policy standpoint as well. We have so many defendants that are employed, and I know it is rare, but from time to time there is a successful self-defense defense triggering this statute; but to reach back all the way to the date of arrest is problematic unless there is a clear nexus and here, given employment documents, that it was simply the fact that he failed to go to work that started this whole ball rolling, I have to find that that is a preponderance of the evidence that

his loss of his job was based on the arrest, and the necessity for a defense from that time forward.

RP 15-16.

After issuing judgment, Judge Tompkins expressed a final note of dissatisfaction with her ruling:

Counsel, I think you can probably tell I am not particularly happy with this ruling. It does appear to go a ways beyond what would be intended ordinarily in this type of requirement for a defense, but I cannot ignore the direct linkage between the firing, him losing his job for not showing up based on the arrest so with that I will sign the order.

RP 17-18. Judge Tompkins issued a written order requiring the State to pay Mr. Villanueva \$48,910.54, including \$10,020 “for lost wages of Tommy Villanueva.”

CP 59-61.

IV.

ARGUMENT

A. THE APPELLATE COURT REVIEWS THE TRIAL JUDGE’S INTERPRETATION OF A STATUTE *DE NOVO*.

Interpretation of a statute is a question of law that the appellate court reviews *de novo*. *State v. Gonzalez*, 168 Wn.2d 256, 263, 226 P.3d 131 (2010). The court's goal in interpreting a statute is to carry out the legislature's intent. *Gonzalez*, 168 Wn.2d at 263. If a statute is clear on its face, the court must use the plain language of the law to identify the legislative purpose and intent. *State v. Watson*, 146 Wn.2d 947, 954, 51 P.3d 66 (2002). The court shall discern the plain meaning

“from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009). The provisions of an act must be viewed in relation to each other and, if possible, harmonized. *Millay v. Cam*, 135 Wn.2d 193, 199, 955 P.2d 791 (1998). The court must avoid an interpretation that would produce an unlikely, absurd, or strained result. *State v. Fjermestad*, 114 Wn.2d 828, 835, 791 P.2d 897 (1990).

B. BY AWARDING MR. VILLANUEVA COSTS UNRELATED TO DEFENDING HIMSELF AGAINST CRIMINAL CHARGES, THE LOWER COURT CONTRADICTED THE PLAIN LANGUAGE OF RCW 9A.16.110.

When a defendant charged with a crime successfully argues that his or her actions were justified as defense of self, others, or property, that defendant is entitled to be reimbursed by the State “for all reasonable costs . . . **involved in his or her defense.**” RCW 9A.16.110 (*emphasis added*). Specifically, the statute provides:

(1) No person in the state shall be placed in legal jeopardy of any kind whatsoever for protecting by any reasonable means necessary, himself or herself, his or her family, or his or her real or personal property, or for coming to the aid of another who is in imminent danger of or the victim of assault, robbery, kidnapping, arson, burglary, rape, murder, or any other violent crime....

(2) When a person charged with a crime listed in subsection (1) of this section is found not guilty by reason of self-defense, the state of Washington shall reimburse the defendant for all reasonable costs, including loss of time, legal fees incurred, and other expenses **involved in his or her defense.** This reimbursement is **not an**

independent cause of action. To award these reasonable costs the trier of fact must find that the defendant's claim of self-defense was sustained by a preponderance of the evidence. If the trier of fact makes a determination of self-defense, the judge shall determine the amount of the award.

RCW 9A.16.110(1)-(2) (*emphasis added*). The purpose of the statute is "to reimburse the citizen who is 'placed in legal jeopardy of any kind whatsoever for protecting [himself] by any reasonable means necessary,' and who is found not guilty by reason of self-defense." *State v. Jones*, 92 Wn. App. 555, 964 P.2d 398 (1998).

A defendant claiming reimbursement under RCW 9A.16.110 must meet two criteria: He or she must show that a jury acquitted him or her **and** found, by a preponderance of the evidence that he or she acted in self-defense. *State v. Jones, supra, citing State v. Anderson*, 72 Wn. App. 253, 260, 863 P.2d 1370 (1993), *review denied*, 124 Wn.2d 1010, 879 P.2d 292 (1994).

The plain language of the statute militates against the trial court's interpretation in this case. First, the statute indicates that it applies to a person "charged with a crime." Only when the defendant is in "legal jeopardy" is the right to reimbursement triggered. RCW 9A.16.110(1). Legal jeopardy attaches when either a jury is empaneled or when evidence is presented to a judge in a bench trial. *State v. Fontanilla*, 128 Wn.2d 492, 500, 909 P.2d 1294 (1996),

citing *State v. Joswick*, 71 Wn. App. 311, 314, 858 P.2d 280 (1993). There is no legal jeopardy at the time of arrest prior to the filing of criminal charges.

The statute limits itself to reimbursing a defendant for “costs, ... legal fees incurred and other expenses **involved in his or her defense.**” RCW 9A.16.110(2) (emphasis added). By its own terms, the statute compensates a defendant for only for those costs related to defending him- or herself against legal charges. By definition, costs consequent to mere arrest do not fall within this ambit.

Nor do cases interpreting the statute support the trial judge’s decision. As noted in *State v. Fontanilla*, RCW 9A.16.110 “provides for reimbursement in any case where the trier of fact determines that the defendant acted in self-defense....” *State v. Fontanilla*, 128 Wn.2d at 492. In accordance with the statute’s plain language, *State v. Jones* holds that a defendant may recover costs incurred within the “prosecution process,” *i.e.*, the time from charging to final resolution of all disputes. *State v. Jones*, 92, Wn. App. at 561-62. By definition, pre-charging arrest is an event outside the “prosecution process;” rather, it is part of the investigation process.

In *State v. Anderson*, the defendant was charged with First Degree Murder and First Degree Assault and remained incarcerated until his acquittal. *State v. Anderson*, 72 Wn. App. 253, 257, 863 P.2d 1370 (1993), *review denied* 124 Wn.2d 1010, 879 P.2d 292 (1994). Based upon the jury’s special verdict that

he acted in self-defense, the defendant submitted a claim for reimbursement, including over \$28,000 in “lost time.” *State v. Anderson*, 72 Wn. App. at 257-58. The defendant claimed he was entitled to this amount as lost “earning capacity” despite the fact that he had provided no proof of either employment or employment prospects at the time of his arrest. *Id.*, at 260-61, 263.

The trial court calculated that the defendant’s lost time was worth \$5,010. *State v. Anderson*, 72 Wn. App. at 258. It arrived at this total by multiplying the federal minimum wage by 40 hours per week for every week the defendant spent in jail. *Id.*, at 258¹.

The Court of Appeals, however, determined that the defendant was not entitled to such an award. The appellate court did agree with the trial judge that a defendant must be indemnified for the loss of “lawful earnings,” however, only those earnings he or she “would have received **but for being prosecuted.**” *State v. Anderson*, 72 Wn. App. at 261 (*emphasis added*). The court further recognized that the right established under RCW 9A.16.110 “[did] not establish an independent cause of action, and . . . does not incorporate all of the various rules that would govern damages in an independent action.” *Id.*, at 261 (internal quotations omitted). Thus, the State was “not required to indemnify or reimburse

¹ However, the trial court ultimately declined to award this amount on the ground that the killing with which the defendant had been charged arose from the defendant “deliberately [seeking out] out a drug transaction in a high crime area,” and thus fell outside the provisions of the statute). *State v. Anderson*, 72 Wn. App. at 58.

for loss of the opportunity to look for employment, unless evidence of that loss is accompanied by evidence showing that the defendant would have received earnings **but for being prosecuted.**” *Id.*, at 262 (*emphasis added*). Nor was the State “required to indemnify or reimburse for a defendant’s loss of earning capacity.” *Id.* The court reasoned that the defendant’s “earning capacity,” *i.e.*, “the permanent diminution of the ability to earn money,” was not affected by the prosecution process because the defendant had the same “capacity” to earn money even though he could not exercise that capacity from jail. *Id.*

Read in conjunction with the plain language of the statute, the *Anderson* case demonstrates that it is not enough for the defense to show that a particular cost or loss is due to the incident underlying the prosecution; rather, the statute makes clear that only those costs incurred **defending** against a resulting prosecution are compensable. Stated another way, RCW 9A.16.110 provides a limited entitlement that is much narrower than the damages that might be available in civil court by way of an independent cause of action.

Here, Mr. Villanueva lost his job not because he was incarcerated after being charged with a crime, but because of his pre-charging arrest. He was out of custody and free to work before he was ever charged with a crime. This loss is not a “cost.... Legal fee....[or] other expense[] involved in his... defense,” but a consequence of arrest premised upon probable cause. The trial court erred when it awarded over \$10,000 to Mr. Villanueva based upon his spending a single day,

prior to being charged, in jail. This award amounts to a windfall stemming entirely from a proper lawful arrest.

V.

CONCLUSION

Mr. Villanueva's pre-charging incarceration was due to an arrest based upon probable cause and was not a result of being charged with a crime. Therefore, the loss of his job due to that arrest is a not a "cost.... of his... defense." The trial judge should be reversed and Mr. Villanueva's award should be reduced to include only those costs associated with defending himself against the charges of assault.

Dated this 31 day of October, 2012.

STEVEN J. TUCKER
Prosecuting Attorney



Deric Martin #28279
Deputy Prosecuting Attorney
Attorney for Appellant